No. 230.

Supreme Court U.S.
FILED
MAR 11 1901
JAMES H. McKENNEY,
Clerk.

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McLaughlin for D. E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

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EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED ET AL.,

Plaintiffs in Error,

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR.

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(17,689.)

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Statement of the Case.

The action comes to this court upon a writ of error to the circuit court of Pennington county, South Dakota. The action originally was tried in the circuit court of Pennington county, South Dakota, and judgment rendered for the defendants therein. An appeal was taken to the supreme court of the state of South Dakota, and that court ordered judgment to be entered for the plaintiff upon the findings of fact made by the court below. The remittitur was sent down, and in accordance with the opinion of the supreme court of the state of South Dakota judgment was entered for the plaintiff on the 13th day of January, 1901. (Transcript, page 44.)

The facts found by the court are as follows: On the 16th day of September, 1882, a portion of the ground in controversy in the

action was located as the Reed Placer Claim by Jacob F. Reed and William Franklin, both citizens of the United States, who made a discovery of placer deposit, posted a notice of location thereon, marked the boundaries of the claim properly and recorded a location certificate of the placer claim in Pennington county. From the date of the location of said Reed Placer Claim until the year 1892, the said Jacob F. Reed and William Franklin were in the actual, notorious and peaceable possession of said placer claim and were the acknowledged and reputed owners thereof: The annual assessment work for the said placer claim was done until the claim was entered for patent.

On the 23rd day of November, 1892, application for patent for the Reed Placer Claim was made and entry thereof perfected in the United States land office at Rapid City, South Dakota, on the 13th day of March, 1893. No application for a lode claim was made in the application for the placer claim.

On the 25th day of January, 1888, Jacob F. Reed and William Franklin, who were then owners in the Reed Placer Claim, and Thomas C. Blair and Frank Eaton, marked the boundaries of the Tin Bar No. 1 location upon the ground with stakes, as required by law; posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for the Tin Bar No. 1 Lode in the office of the register of deeds of Pennington county, but did no other act or acts of location at the time. The location notice of the Tin Bar No. 1 Lode was posted inside the boundary line of the Reed Placer Claim and between 150 and 200 feet easterly of the northwesterly boundary line of said Reed Placer Claim, and the point claimed as the discovery on the Tin Bar No. 1 Claim is the same point at which the notice was posted. The location notice upon the Tin Bar No. 1 Claim was posted upon a well defined ledge of rock in place carrying tin, but the plaintiff and defendants in the action had no knowledge of the existence of tin, or other valuable deposit therein, until after the action in the court below was commenced, to wit: until during the trial of said cause, which took place on the 17th day of January, 1896. No labor was performed or improvement made upon the Tin Bar No. 1 location, except about four days work in 1889 and about four days work in 1891, such work being of the value of not exceeding fourteen dollars in each of said years 1889 and 1891.

There was no agreement on the part of the defendants in the action below, Thomas C. Blair and William Franklin, or either of them, with the plaintiff to perform any labor or make any im-

provement on said Tin Bar No. 1 location in the years 1893 or 1894, and no contractual relation existed between said parties in regard to said Tin Bar No. 1 location at the time of the location of the Holy Terror Lode Claim on the 28th day of June, 1894.

On the 25th day of January, 1888, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 location upon the ground with eight substantial posts or stakes, and posted a location notice upon said claim, and thereafter recorded a location certificate for the same in the office of the register of deeds in and for Pennington county, but did no other act or acts of location at the time. During the year 1891 said Thomas C. Blair and William Franklin, who were co-owners in said Tin Bar No. 2 Lode, together with Frank Eaton, discovered a well defined ledge of mineral bearing rock in place carrying gold upon the Tin Bar No. 2 Claim, which point of discovery was outside of the limits of the Reed Placer Mining Claim. No labor was performed or improvements made upon the said Tin Bar No. 2 Lode except about four days work performed thereon in the year 1891, of the value of not to exceed the sum of fourteen dollars. There was no agreement on the part of the defendants, William Franklin and Thomas C. Blair, or either of them, with the plaintiff, to perform any labor or make any improvements upon said Tin Bar No. 2 location for and during the years 1892, 1893 and 1894, and there was no contractual relation between said parties with reference to said location during said years.

The Holy Terror location was properly made, and was a valid location at the date of its location by the defendant, William Franklin, on the 28th day of June, 1894; and the Keystone No. 4 location from the date of the amended location certificate, to-wit: the 20th day of September, 1894, was properly made, and a valid location of the ground described in the amended location certificate thereof, and the laws of the state of South Dakota and of the United States were complied with so far as they relate to the Holy Terror and Keystone No. 4 locations from the date of the location of the Holy Terror mine and the date of the amended location of the Keystone No. 4 Lode Claim to the present time.

At the date of the trial below the owners of the Holy Terror and Keystone No. 4 locations were William Franklin, Thomas C. Blair, Albert Amsbury and John J. Fayel, save for the rights of the plaintiff in that action.

No adverse was filed by the plaintiff, or any owners of the Tin

Bar No. 1 and Tin Bar No. 2 locations to the application for patent to the Reed Placer Claim.

At and prior to the time of the application for patent for said Reed Placer Claim, to-wit: the 23rd day of November, 1892, there were no known lodes or veins upon said Reed Placer Claim within the boundary lines of the Tin Bar No. 1 or Tin Bar No. 2 locations of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for their exploitation or devolopment.

In the application for patent to the Reed Placer Claim there was no application for patent to any lodes or veins included therein.

The southeast end of the Holy Terror Lode Claim embraces a portion of the ground formerly covered by the northwest end of the Tin Bar No. 1 Lode, the area in conflict amounting to 1.62 acres, and described as follows, to-wit: Commencing at the southeast corner of the Holy Terror Lode Mining Claim, and running thence N. 62 deg. 12 min., W. 394.6 feet; thence S. 28 deg. 0 min., W. 7 feet; thence S. 41 deg. 5 min., W. 102.1 feet; thence S. 47 deg. 57 min., E. 480 feet to the southwest corner of the Holy Terror Lode Mining Claim; thence N. 15 deg. 30 min., E. 222.7 feet to the place of beginning.

The southeast end of the Keystone No. 4 Lode location embraces a portion of the ground formerly embraced by the Tin Bar No. 2 Location, the area in conflict amounting to 2 71 acres, and described as follows, to-wit: Commencing at the southeast corner of the Keystone No. 4 Lode Mining Claim, and running thence N. 47 deg. 57 min, W. 480 feet; thence S. 38 deg. 6 min., W. 119 feet; thence S. 39 deg. 36 min., W. 92 feet; thence S. 41 deg. 50 min., E. 135.1 feet; thence S. 47 deg. 57 min , E. 446.3 feet to the southwest corner of the Keystone No. 4 Lode Mining Claim; thence N. 15 deg. 30 min., E. 252.6 feet to the place of beginning.

During the year 1888 Frank Eaton conveyed, by deed in due form, to one George W. Williams, a citizen of the United States, an undivided one-quarter interest in the Tin Bar No. 1 and Tin Bar No. 2 claims, and other property. During the same year said Williams executed and delivered to the plaintiff below, Patrick B. McCarthy, and one Michael McGuire, a mining deed in due form for the same property, to-wit: an undivided one-fourth interest in and to the Tin Bar No. 1 and Tin Bar No. 2 lodes, and other mining property. On the 22nd day of April, 1890, Frank Eaton

conveyed to said defendant, Franklin, an undivided one-fourth interest in said Tin Bar No. 2 claim, and said Thomas C Blair conveyed an undivided one-fourth interest therein to Jacob F. Reed.

Before the commencement of the action below, the defendants, John J. Fayel and Albert Amsbury, became owners in said Holy Terror and Keystone No. 4 Lode Mining Claims and at the beginning of said action said Franklin, Blair, Fayel and Amsbury each owned an undivided one-fourth interest in the Holy Terror Lode Mining Claim and an undivided seven-thirty sixth interest in the Keystone No. 4 Lode Mining Claim, save for the rights of the defendant in error.

Upon these facts and upon the assignments of error which were filed in this case, but two questions arise. The first and main question in the case is, whether one co-owner in a mining claim can relocate the same when the annual labor has not been performed so as to exclude his co-owners from any interest in the ground. The second question is, whether the owners of a placer claim, who locate a lode claim within the boundaries of the placer claim, properly record their location certificate, and hold out to the world that they are the owners of the ground by reason of the lode claim, can, even after patent has issued for the placer claim, assert that there was no discovery upon said lode; and that by reason of the discovery having been patented within the placer claim all rights under the lode location are gone. This second question does not affect the ground included within the limits of the Tin Bar No. 2 Lode because there was a discovery of a well defined ledge of rock in place, carrying gold, made within the limits of the Tin Bar No. 2 Lode, outside of the boundaries of the Reed Placer Claim.

BRIEF OF ARGUNENT.

I.

Where the annual assessment work upon a mining claim has not been performed, can a co-owner relocate the ground so as to deprive his co-owners of any interest therein?

The main controversy raised by the assignments of error in this case and the one upon which all other propositions depend, is, whether, when the annual assessment work has not been done upon a mining claim, one co-tenant therein can relocate the same

and obtain title thereto, not only as against the world, but as against his co-tenants. Our proposition is, that when a co-tenant attempts to relocate ground upon which the annual assessment work has not been done the location is valid, but he at once becomes a trustee for his co-tenants to the extent of their interest in the old location. The 10th and 23rd findings of fact, made by the court below, show that the Tin Bar No. 2 Location was a valid existing mining claim, because all the necessary acts of location were performed by the locators, and the discovery of a well defined ledge of mineral bearing rock in place, carrying gold was made by the locators during the year 1891, which discovery was outside the limits of the Reed placer claim. As to the Tin Bar No. 2 Lode, therefore, the only question which arises is, could Franklin and Blair relocate said lode as the Keystone No. 4 and deprive their co-tenant, McCarthy, of his interest in said lode? The same proposition arises as to the Tin Bar No. 1 Lode. The court below found, in the 21st finding of fact, that an undivided one eighth interest in the Tin Bar No. 1 and No. 2 lodes had been conveyed to the plaintiff below, and that Blair and Franklin were co-owners in said lode with him.

It would seem that this court had settled the question in favor of the defendants in error by its decision in the case of Turner v. Sawyer, 150, U. S 578; 14 Sup. Ct. Rep. 192. In that case the Supreme Court says:

"It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common, who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his co-tenants, to acquire a title, to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. We think the general rule as stated in Bissell vs. Foss, 114 U. S. 252-259; 5 Sup. Ct. Rep. 851, should apply; that 'such a purchase (of an out-

standing title or incumbrance upon the joint estate for the benefit of one tenate in common) inures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others.' *Rothwell v. Dewees*, 2 *Black*, 613. *Van Horn v. Fonda*, 5 *Johns. Ch.* 388. *Lloyd v. Lynch*, 28 *Pa., St.* 419. *Downer vs. Smith*, 38 *Vt.* 464. A title thus acquired the patentee holds in trust for the true owner, and this Court has repeatedly held that a bill in equity will lie to enforce such trust. *Johnson v. Towsley*, 13 *Wall.* 72. *Moore v. Robbins*, 96 *U. S.* 530. *Marquez v. Frisbie*, 101 *U. S.* 473. *Rector v. Gibbon*, 111 *U. S.* 276. *Monroe Cattle Company v. Becker*, 147 *U. S.* 47."

The Civil Code of of the state of South Dakota, also supports this contention. Sections 3915, 3919, 3920, 3921, 3923, 3927, Compiled Laws, South Dakota (1887), are as follows:

"§ 3915. Everyone who voluntarily assumes a relation of personal confidence with another, is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires informatihn which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

§ 3919. One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner.

Sec. 3920. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

§ 3921. In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter, by the slightest misrepresentation, concealment, threat or adverse pressurs of any kind.

§ 3923. Neither a trustee, nor any of his agents, may take part in any transaction concerning the trust, in which he, or anyone for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts

concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so.

2. When the beneficiary, not having power to contract, the circuit court, upon the like information of the facts, grants the like permission; or,

3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the circuit court for the latter, in the manner above prescribed.

§ 3927. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust."

Mr. Morrison in his Mining Rights, eighth edition, page 83, says:

"The question, therefore, whether a single co-tenant can relocate at all, for his own benefit, before the case of *Turner v. Sawyer*, 150 *U. S.* 578, was decided, was somewhat in doubt. * * * The case of Turner v. Sawyer, above cited, lays down the true principle applicable to the case, to-wit: that a co-tenant cannot acquire and hold adversely a hostile title without allowing the right to a co-tenant to pay his proportion of the costs, and take the benefit of the same, and that perfecting patent was the purchase of such a title."

Mr. Wade in his American Mining Laws at page 58, Sec. 32, says:

"It has been decided that one of several co-owners of a mine, upon which there has been a failure to perform the amount of labor required by district rules, might treat it as abandoned property and relocate it in the name of himself and others, and thus appropriate the interest of a co owner who failed to contribute. The authority of this case is questionable even under district rules that did not render the failure to perform labor *ipso facto* an abandonment of the claim. There is no doubt that it would be inapplicable under the law of congress governing the question of forfeiture, and prescribing the method by which it might be taken advantage of by co-owners. That provides that for failure to contribute his proportion of the expenditures he will be subject to the process which is popularly known as "advertising out." That is, by notice served personally or by publication, and after

the expiration of ninety days after such a service is complete, and a continued failure to respond, his interest is divested and passes to his co-owners who have made the required expenditure."

Mr. Lindley in his Work on Mines says:

"Relocation by one of several original locators in hostility to the others.

If we are right in the conclusions reached in the preceding section, that the original locator cannot plead his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow, that one of several locators seeking to obtain the entire title by reason of the failure of any of them to fulfil the requirement of the law, is likewise prohibited from making such relocation.

The supreme court of Montana has held that mining claims owned by several in common must be 'represented' that is, the work must be performed—as if owned by one person; that representation is a unity; that co-owners may cause representation work to be done on the claim according to their respective interests, but when completed, it must amount to one whole representation; otherwise, the claim is not protected from relocation, and that under such circumstances, one of the co-owners might relocate. *Saunders v. Mackey*, 5 *Mont.* 523. But we think that this doctrine is opposed to the views of the Supreme Court of the United States, announced in *Turner v. Sawyer*, 150 *U. S.* 578, wherein it is said that the general rule, that the purchase of an outstanding title or incumbrance, upon the joint estate for the benefit of one tenant in common inures to the benefit of all, because there is an obligation between them arising from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of others, should apply to a case where one co-tenant of a mining claim secures the entire title in his individual name. See also Freeman on Cotenancy. Sec. 151.

The courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded co-tenants are not adverse claimants within the meaning of the law requiring them to intervene in patent pro-

ceedings, as they claim equities which are based upon the legal title thus conveyed. *Suessenbach v. First National Bank*, 5 *Dak.* 477; *Brundy v. Mayfield*, 15 *Mont.* 201; *Doherty v. Morris*, 11 *Col.* 12. Be that as it may, although the views announced by the supreme court of Montana seems to give support to the doctrine of the supreme court of Utah, cited in the preceding section, we cannot see why the reason applied by us in that section to the case of an individual locator should not apply with equal force to one of several locators. In the latter case, the obligation rests upon all alike to perform the required work. One of the co tenants might save the entire estate by himself performing the labor. In such event, he would have a right of contribution against his co-tentants for their proportion of expenditures made to save the common estate, which he might assert, either in an action for partition, or, perhaps, by 'advertising out' under the provisions of the Revised Statutes. But to say that one co owner can make his own delinquency, as well as that of his co-tenants, the basis for acquiring a new title, seems to us repugnant to the intent and spirit of the law."

1 *Lindley on Mines, Sec.* 406.

In *Mills, et al. v. Hart, et al.*, (*Col.*) 52 *Pac.* 680, it was held:

"A purchase by the individual defendants, or some of them, of an interest in the locations of April 13, 1880, would make the defendants thus purchasing and the plaintiffs co-owners in these locations. During the existence of this relationship, a purchase by such defendants of the title initiated by the relocations of January 2, 1882, would inure to the benefit of their co-owners in the original locations. A purchase by the company from such defendants, with notice of the rights of plaintiffs, would vest the title in the former, burdened with the equities of the latter therein; and the title thus held by the company would be in trust for the plaintiffs to the extent of their interest in the premises."

In this particular case the plaintiffs were co-owners with the grantors of defendants in the Nevada and Champion lodes. These lodes were relocated by other parties and some of the co-owners in the lodes purchased the relocations. An amended location certificate was filed in which the two lodes were included as one,

named the Champion, and no rights acquired under the relocations were waived. A patent was thereupon issued for the Champion Lode. It will be seen that the facts in that case were very similar to the facts in this.

The cases which are cited as opposed to the views of the Supreme Court of the United States and of these eminent authors on mining laws are, *Strang v. Ryan*, 46 *Cal.* 34; *Saunders et al. v. Mackey*, 5 *Montana*, 523; 6 *Pac.* 361; *and Doherty v. Morris*, 16 *Pac. Rep.* 911.

The Strang case arose under district rules. The question is not squarely raised and the opinion of the court is criticized by Mr. Wade, Mr. Morrison and Mr. Lindley. In *Saunders v. Mackey*, 5 *Mont.* 523; 6 *Pac.* 361, there was an attempt by the co-tenant to claim under the old location, and not to have an interest in the new location, which is a different case entirely from the present one. In that case the court says at the close of the opinion: "If the respondent has violated his contract he is liable to damages for a breach thereof, and if the relations between him and Julia D Saunders were such as to make him her trustee in the location of the Baltimore Claim, a proper action would so declare him and protect her interest therein: but there is nothing in the complaint to invalidate the Baltimore location and claim." So that this case would really support the doctrine for which we contend.

In the case of *Doherty v. Morris*, (*Col.*) 16 *Pac.* 911, it is simply held that in an adverse suit one cannot assert an equitable title to the lode which he attacks by his adverse.

The general doctrine of the cases is that one sustaining fiduciary relations to another cannot relocate such beneficiary's claims.

Suessenbach v. Bank, 41 *N. W.* 662; 5 *Dak.* 477.
Sawyer v. Turner, 16 *Mining Reports*, 260, *per Hallet J.*
Hunt v. Patchen, 35 *Fed.* 816.
Rollin v. Lockhart, (*Idaho*), 21 *Pac.* 413.
Lakin v. Sierra Buttes G. M. Co. 25 *Fed.* 337.
Utah, etc. Co. v. Dickert etc. Co. (*Utah*), 21 *Pac.* 1002.
Clement v. Cates, (*Ark.*) 4 *S. W.* 776.

The reasons for the rule seem to us very strong, even if the de-

cision of the Supreme Court of the United States had never been made. The opinion of the circuit court and the contention of the plaintiffs in error in this case are based upon the theory that whenever the annual assessment work is not done upon a claim it becomes at once a nullity, and, therefore, the relation of co-tenancy ceases, and thereafter the co-tenants owe each other no further duty. This view of the court and of the plaintiffs in error is not warranted by the statute or by the decisions.

Section 2324 of the Revised Statutes of the United States provids for the annual work to be done upon mining claims and then proceeds: "and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as though no location of the same had ever been made; provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." Then follows a provision by which one co owner, who may do the work upon the claim, can acquire the interest of the other owners by what is known in mining countries as "advertising out."

It will be seen that the claims do not become a nullity by the mere failure to do the work. The owner may resume work at any time and the claim is then as valid as it ever was. Two things are necessary before the claim becomes a nullity; there must be a failure to do the annual assessment work, and there must be a taking advantage of this failure by someone else.

The Supreme Court of the United States in the celebrated case of *Belk v. Meagher*, 104 *U. S.* 279, says:

"The argument on the part of the plaintiff in error is, that if no work was done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been had no default occurred."

In *Oscamp v. Crystal River M. Co.* (*C. C. A. 8th Circuit*) 58 *Fed.* 293, the court says:

"In *Belk v. Meagher*, 104 *U. S.* 279, 283, it was held, after much consideration, that a mining location, when perfected according to the statutes of the United States and local laws and regulations, 'is property in the highest sense of that term, which can be bought, sold and conveyed and will pass by descent,' and that there is nothing in the lawunder which such property is acquired 'which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for the protection of any other grant from the United States.' It was furthermore held in that case that a failure to do the requisite amount of annual development work on a claim under Sec. 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and that such right of relocation is itself lost, and the original owner is restored to all of his rights if he enters without force and resumes work, before a relocation is perfected by any third party. * * * The necessary conclusion seems to be that neither the failure of the owner to occupy or to work his claim during a given year will operate to divest him of his title, and to confer it upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws, and, as the statutes of Colorado prescribe the mode in which third parties may divest the title of the original owner by a relocation, if the statutes in that respect are not pursued, the status of all persons remains unaltered, barring the possible effect of limitations or laches; and if at any time the original owner re-enters and resumes work, the right of relocation is then lost."

The same doctrine is laid down in the following cases:

Justice Mining Co. v. Barclay, 82 *Fed.* 554.
Klopenstine v. Hays, 57 *Pac.* 712.
Lakin v. Sierra Butte M. Co. 25 *Fed.* 337.
Jupiter M. Co. v. Bodie Con. M. Co. 7 *Sawy.* 93 11 *Fed.* 666.
North Noonday M. Co. v. Orient M. Co. 6 *Sawy.* 301; 1 *Fed.* 522.
2 *Lindley on Mines*, § 644.

When a co-tenant goes upon the ground, and undertakes to make a relocation by taking advantage of a discovery formerly made, all of his acts will be presumed to be for the benefit of his co-tenants. He had the right by merely resuming work to avoid

any forfeiture of the claim; if, instead of resuming work as he should have done for the benefit of those owning with him, he makes a relocation of the claim, and if the location is valid it will inure to the benefit of those owning in the old location. This rule is supported by the provisions of the statute itself, because congress has provided a method by which one owner can obtain the rights of his co-owners; and congress having provided this method, it is clear that there is no other method by which an owner can divest the other owners of their interest in the claim. If the work has not been done upon a mining claim, the tenant who has thought it of sufficient value to justify the expenditure upon it can give notice to his partners of his expenditure, and if, within ninety days they fail to pay their share, their interest at once passes to the owner who has performed the work.

The doctrine which we contend for is supported by the decision of the Supreme Court of the United States, by the act of congress, by three distinguished authors upon mining law, by the well settled principles of the law of co-tenancy, and by every dictate of justice and fair dealing,

II.

Can a lode claim be located within the limits of a valid placer claim, provided it can be done peaceably?

Section 2329 of the Revised Statutes of the United States provides:

"Claims usually called 'placers,' including all forms of deposits, *excepting veins of quartz or other rock in place*, shall be subject to entry and patent, etc."

It will be seen that the very statute which authorizes the location of a placer claim, excepts veins of quartz or other rock in place from the grant, and these do not, under sections 2329 and 2333, pass by such grant, if known. An explorer can, therefore, go within the limits of the placer claim and locate a lode thereon, provided he do so without a breach of the peace.

1 *Lindley on Mines*, § § 413, 414 *and* 415.
Mt. Rosa Mining M. & L. Co. v. Palmer, (*Colo.*) 56 *Pac.* 176.

Mr. Lindley says:

Right ... appropriate lodes within placers. That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those usually called placers, frequently exist in the same superficial area is a matter of common experience. That when so found they may be held by the same or different persons, is well settled by both judicial and departmental decisions.

. While it is undoubtedly true that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected is equivalent to a grant from the government, yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.

There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former there is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface. On the other hand, lodes found within the placer surface or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is, to sever them from the body of the public lands, and to deal with them and the land immediately enclosing them as separate and distinct entities.

The location of mining ground for placer purposes does not effect such severance. The placer claimant *may*, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation. This right to appropriate the lode must flow from the dis-

covery of the *lode*. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; *provided*, always, that such appropriation is made and perfected peaceably and in good faith. In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings, are to be applied. We have fully discussed this element in preceding articles. It is unnecessary here to repeat what is there said. * * * * We are justified in deducing from the foregoing the following conclusions:

(1) A perfected placer location does not confer the right to the possesssion of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a patent;

(2) Such lodes may be appropriated (a) by the placer claimant, or (b) by others, provided the appropriation is effected by peaceable methods and in good faith;

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a *lode*, the title to such lode does not pass by the patent, but it may be located by any one having the requisite qualifications, provided the location is made peaceably and in good faith.

Manner of locating lodes within placers.

With the exception of determining the quantity of surface which may be taken in conjunction with a lode found within a placer claim, a question to be presented in the next section, there is no difference between the manner of locating such a lode and any other found within the public domain. * * * * But let us assume the case of a lode discovered within a prior placer claim by a stranger to the placer title, such discovery ante-

dating the application for a placer patent. That such lode may be located and claimed by the discoverer seems to be well settled. But the extent of surface to which such locator may be entitled, with due regard to the rights of the prior placer claimant, is the subject of debate. The question assumes this form: What is in contemplation of law reserved out of a placer location? or, to what extent is the surface of a prior placer location subject to invasion and delimitation by a subsequent discovery of a lode within the placer boundaries? * * * The conclusion seems logical, that if a lode within a placer is subject to appropriation at all, it may be appropriated the same as if it were situated elsewhere. The placer claimant locates with the full knowledge that a lode discovered within the limits of his claim will not belong to him by virtue of his placer location; and that when such is discovered it may be located by those whose rights can only be defined by end and side lines carving out of the placer a surface area. The government says to him, in effect: 'You may locate this ground which appears to be placer, but you do so with the distinct understanding, that if a lode is discovered therein before you apply for a patent, such lode shall belong to him who first discovers and locates it. Such discovery will entitle the discoverer to all privileges which are accorded with respect to lodes found elsewhere on the public domain.'"

1 *Lindley on Mines*, §§§ 413, 414 *and* 415.

In *Mt. Rosa Mining M. & L. Co. v. Palmer*, (*Colo.*) 56 *Pac.* 176, the court says:

"Since a patent conveys to the placer locator no other or different rights than those acquired under the location, it inevitably follows from the doctrine thus announced, that he has no possession, and acquires no right to any lodes known to exist within his claim, by virtue of his placer appropriation. In *Aurora Lode v. Bulger Hill & Nugget Gulch Placer*, *supra*, (23 *Land Dec.* 95) Secretary Smith, in discussing the rights acquired by the placer locator, said: 'Such a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries, except as a placer claim or mine. Of its own force it cannot operate to give title to or property rights in any veins or lodes within its boundaries. True, a placer mining claim be-

comes property, as such, by discovery and location, the same as a vein or lode claim, but it cannot and does not, of itself, in any sense, give title to or property rights in veins or lodes; nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries.' And Mr. Lindley, in his admirable work on Mines, after an elaborate and thorough discussion of the question, deduces the following conclusions:

'(1) A perfected placer location does not confer the right to the possession of veins or lodes which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (a) by the placer claimant, or, (b) by others, provided the appropriation is effected by peaceable methods and in good faith.'

While we recognize to its full extent the rule that precludes the initiation of a right by a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent, and, appellant not having taken the necessary steps to obtain possession of them, they were open to location by others at the time they were located by the grantors of appellee. *In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact that they were made within the surface boundaries of a prior placer location.*"

But if this were not true the locators of the Reed Placer Claim, having themselves joined in the location of the Tin Bar No. 1, certainly abandoned so much of the placer claim as conflicted with the Tin Bar No. 1, or acquiesced in its location, and are now estopped to dispute the validity of the Tin Bar No. 1 Location within the limits of the Reed Placer Claim.

McCarthy v. Speed, 77 *N. W.* 590; *s. c.* 11 *S. D.* 362.
McCarthy v. Speed, 80 *N. W.* 135; *s. c.* 12 *S. D.* 7.
Eichelberg v. Soper, 1 *S. D.* 563.
Parliman v. Young, 2 *Dak.* 185.
Bostwick v. Benedict, 4. *S. D.* 414; 57 *N. W.* 58.
Liberty Township v. Hutchinson, (*S. D.*) 64 *N. W.* 1117.

J. I. Case v. Pederson, 60 *N. W.* 747.
Evanston v. Webster, 3 *S. D.* 383.
Tollerton & Stetson Co. v. Casperson, (*S. D.*) 63 *N. W.* 908.
Brooms' Legal Maxims, 168.
Bigelow on Estoppel, 542-642.
U. S. v. Lamont, 165 *U. S.* 303;
Maricopa etc. R. R. Co. v. Arizona, 156 *U. S.* 347.

So far as the discovery of the Tin Bar No. 1 is concerned, in addition to this the finding is ample that the discovery was made upon a well defined lode or vein of rock in place carrying tin; but the court finds that this was not known to the locators until at the time of the trial below, although they posted their location notice upon this lode or vein, called it the Tin Bar No. 1 Lode, and worked upon it as a lode claim. The plaintiffs in error are clearly estopped to assert the invalidity of their own location, having placed their location certificate upon record, and having deeded an interest therein, which passed by regular conveyances to the defendant in error. But if they were not so estopped, this finding of the court upon the discovery of the Tin Bar No. 1 is sufficient to show a valid discovery.

A paying lode or vein need not be discovered to entitle a locator to a valid location, but it is sufficient if the lode contains such indications of mineral that he is willing to spend his time and money in anticipation of finding ore sufficiently valuable to work.

Shreeve v. Copper Bell Mining Co., (*Mont.*) 28 *Pac.* 315.
Burke v. McDonald, (*Idaho*) 29 *Pac.* 98.
Werner v. McNulty, (*Mont.*) 14 *Pac.* 643.
Book v. Justice Mining Co. 58 *Fed.* 161.
Hyman v. Wheeler, 29 *Fed.* 347.
Golden Terra M. Co. v. *Smith*, 2 *Dak.* 402.
Harrington v. Chambers, 3 *Utah*, 94.
Montana Central Railway Co. v. *Migeon*, 68 *Fed.* 811.

Section 2001, Compiled Laws, South Dakota, (1887) is as follows:

"Before filing such location certificate the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well defined mineral vein or lode; second, by posting at

the point of discovery, on the surface, a plain sign or notice, containing the name of the lode, the name of the locator or locators and the date of discovery, the number of feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode; third, by marking the surface boundaries of the claim."

The statute of South Dakota is taken from Colorado, where a discovery shaft ten feet deep was required before the discovery was valid, but that provision of the Colorado statute was left out, as borrowed by us, and we never had such a provision until the passage of Chapter 115, of the laws of 1899, of the state of South Dakota.

More than this, in the amended answer in the case the plaintiffs in error alleged the forfeiture of the Tin Bar No. 1 lode claim by reason of failure to do the work thereon.

The allegation of forfeiture is an implied admission of the validity of the first location.

Belk v. Meagher, 104 *U. S.* 284.
Willis v. Blain, 20 *Pac.* 798.
Providence G. M. Co. v. Burke, 57 *Pac.* 641.

III.

The patenting of the Reed placer claim in no wise affected the validity of the Tin Bar No. 1.

Section 2319 of the Revised Statutes of the United States is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase."

Section 2329 of the Revised Statutes of the United States is as follows:

"Claims usually called 'placers,' including all forms of deposit, *excepting veins of quartz, or other rock in place*, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Section 2333 of the Revised Statutes of the United States is as follows:

"Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for patent for the placer claim, with the statement that it includes such vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chaper, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings, and where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent of such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." (Act of Congress, May 10, 1872, Ch. 152, Sec. 11).

The Supreme Court of the United States in *Noyes v. Mantle*, 127 *U. S.*, page 353 says:

"The section can have no application to lodes or veins within the boundaries of a placer claim, which have been previously located under the law of the United States and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher*, 104 *U. S.* 279, 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent.' The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them. *Sullivan v. Iron S. M. Co.* 109 *U. S.* 550. * * * * Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record, we think it may safely be said that the vein or lode is known to

exist, although personal knowledge of that fact may not be possessed by the applicant for the patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

It is contended, however, that because the placer claim was located first, no entry thereon could be made to locate a lode claim. In *Noyes v. Mantle*, 127 *U. S.* 353, neither the opinion in the Supreme Court of the United States nor in the Montana supreme court shows whether the lode was located prior to the placer claim or not.

Mantle v. Noyes, 5 *Mont.* 274; 5 *Pac.* 856.

The facts in the case do show, however, that the lode was located on April 23, 1878, and that the placer application was made December 14, 1878. As the placer applicants would have to do at least five hundred dollars worth of work before they could apply for a patent, and as they must have appiied to the surveyor general for a survey of their claim, had it surveyed and field notes returned to them before application for patent was filed in the local land office, it could well be presumed that their location must have been prior to April 23, 1878. But, however this may be, as neither the supreme court of Montana nor the Supreme Court of the United States mentions the question of priority of location, it seems that the placer claim must have been located prior to the lode claim, because if the lode claim was first located, it gave to the owner thereof the right to not only all the lodes contained therein but to the exclusive possession and enjoyment of the surface thereof, so that a placer claim thereafter located would acquire to no right to anything whatever.

§ 2322, *Rev. Stat. U.S.*

The defendant in error believes that the questions in this case were disposed of by the supreme court of the state of South Dakota upon grounds entirely independent of any federal question. Certainly the decision of that court as to the discovery upon the Tin Bar No. 1 was based solely upon the doctrine of estoppel, the court holding that the locators of the Holy Terror Lode were estopped to deny the validity of the Tin Bar No. 1, having partici-

pated in the location of said lode, placed their location certificate of record and conveyed interests to other parties who relied upon the acts done by them. As to the main question in the case, the right of one co-tenant to relocate the common lode claim, when the annual labor has not been performed, so as to exclude his co-owners from any interest in the ground, the court bases its decision not upon any construction or applicability of the statute of the United States, but solely upon the doctrines of co-tenancy.

If, however, the writ of error should not be dismissed in this case, we think that the decision of the supreme court of the State of South Dakota is supported by the decision of this court above quoted, by the decision of every lower court which has passed upon this question, by the opinions of the distinguished gentlemen who have written treatises upon mining law, and whose opinions are quoted in almost every mining case by this Court, and by the principles of justice and fair dealing which should prevent the locator of a claim from representing to the world that he has made a discovery of mineral upon land, and afterwards turning around and saying to those who have relied upon his representations, that they were untrue; and which prevent a partner in a mining claim, when he has the option of making his location perfectly valid by merely resuming work after the annual work has not been done, from relocating the ground for himself and thus depriving his partners of their interest in the claim.

Respectfully submitted,

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